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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON, Chairman
JEFF HATCH-MILLER
WILLIAM A. MUNDELL
KRISTIN K. MAYES
GARY PIERCE

Arizona Corporation Commission

DOCKETED

AUG 24 2007

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In the matter of:

AGRA-TECHNOLOGIES, INC. (a/k/a **ATI**),
a Nevada corporation,
5800 North Dodge Avenue, Bldg. A
Flagstaff, Arizona 86004-2963;

DOCKET NO. S-20484A-06-0669

WILLIAM JAY PIERSON (a/k/a **BILL**
PIERSON),
and SANDRA LEE PIERSON (a/k/a **SANDY**
PIERSON),
husband and wife,
6710 Lynx Lane
Flagstaff, Arizona 86004-1404;

**SECURITIES DIVISION'S RESPONSE TO
APPLICATION TO INTERVENE AND
EXPEDITED RULING ON APPLICATION
TO INTERVENE**

(Administrative Law Judge Marc Stern)

RICHARD ALLEN CAMPBELL (a/k/a **DICK**
CAMPBELL),
and SONDR A JANE CAMPBELL,
husband and wife,
8686 West Morten Avenue
Glendale, Arizona 85305-3940;

WILLIAM H. BAKER, JR. (a/k/a **BILL**
BAKER), and PATRICIA M. BAKER,
husband and wife,
3027 N. Alta Vista
Flagstaff, Arizona 86004;

JERRY JOHNSTON HODGES,
1858 Gunlock Court
Saint George, Utah 84790-6705;

LAWRENCE KEVIN PAILLE (a/k/a **LARRY**
PAILLE),
220 Pinon Woods Drive
Sedona, Arizona 86351-6902;

Respondents.

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AZ CORP COMMISSION
DOCKET CONTROL

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") responds to the Application to Intervene ("Application") brought pursuant to A.A.C. R14-4-301 and A.A.C. R14-3-105 and the Motion for Expedited Ruling ("Motion") made of behalf of certain participants in the Ore Rights and Mining project of Agra Technologies, Inc. ("ATI") ("Petitioners").¹ For the reasons set forth herein, the Division respectfully requests that the Application and Motion be denied.

A. Petitioners are not directly and substantially affected by the administrative proceedings and should not be permitted to intervene.

1. *The authority of the Commission to enforce the Arizona Securities Act in the context of an administrative proceeding is limited by A.R.S. §44-2032(1).*

Enforcement of the Arizona Securities Act ("Securities Act"), A.R.S. §44-1801 *et seq.*, protects a public right. The primary purpose of the Securities Act is to protect the public from fraudulent securities transactions and to preserve fair and equitable business practices. *See Laws* 1951, ch. 18, §20. To protect the public, the Securities Act imposes a variety of requirements on parties selling securities, including disclosure of material information, reporting requirements for ongoing activities, and oversight responsibilities of dealers and salesmen. The Arizona legislature has charged the Commission with the enforcement of the Securities Act. A.R.S. §44-2032. *See also, Carrington v. Arizona Corp. Comm'n*, 199 Ariz. 303,306, 18 P.3d 97,100 (Ct. App. 2001), *rev. denied*. In the present case, the Division has alleged that the Respondents² violated both the registration requirements and the anti-fraud provisions of the Securities Act.³

The jurisdiction of an administrative agency may be limited by the statutes authorizing the

¹ Petitioners consist of Sperry Andrews, Hoffa Bogart, Colin Caie, Bob and Peggy DeYoung, Rhonda Faris-Holman, Patricia Kerschner, Nigel Smith, James Sweet, Jeanie Stevenson, James Urquhart, and Dave and Janet Vette.

² Respondents Richard Allen Campbell and Sondra Jane Campbell entered into an Order to Cease and Desist, Order of Restitution, and Order for Administrative Penalties ("Consent") which was approved by the Commission on August 13, 2007 as Decision No. 69774. Respondents Jerry Johnston Hodges and Lawrence Kevin Paille have also entered into a Consent the approval of which is to be addressed by the Commission at its next regularly scheduled open meeting. Accordingly, for purposes of this Response, "Respondents" shall be defined as Agra-Technologies, Inc., William Jay and Sandra Lee Pierson, William H. Baker, Jr., and Patricia M. Baker.

³ On October 18, 2006, the Division filed a Temporary Order to Cease and Desist and Notice of Opportunity for Hearing which was amended on June 12, 2007 by the filing of its First Amended Temporary Order to Cease and Desist and Notice for Opportunity for Hearing ("First Amended TC&D and Notice").

1 agency to act. The Arizona Supreme Court has consistently held that the Commission **has no**
2 implied authority to act. *Rural/Metro Corp. v. Arizona Corp. Comm'n*, 129 Ariz. 116, 117, 629
3 P.2d 83, 84 (1981) ("such powers as the Commission may exercise do not exceed those **to be**
4 derived from a strict construction of the **constitution** and implementing statutes"). The
5 Commission's authority to enforce the **Securities Act** in an *administrative proceeding* is **set forth in**
6 A.R.S. §44-2032(1). Specifically, A.R.S. **§44-2032(1)** provides as follows:

7
8 If it appears to the **commission**, either on **complaint** or otherwise, that any
9 person has engaged in, is **engaging in** or is about to **engage** in any act, practice or
10 transaction, that constitutes a **violation** of this chapter, or any rule or order of the
11 commission under this chapter, **the commission may**, in its discretion:

12 1. Issue an order directing such **person** to cease and **desist** from engaging in the **act**,
13 practice or transaction, or doing **any other** act in **furtherance** of the act, practice or
14 transaction, and to take appropriate **affirmative action** within a reasonable time, **as**
15 prescribed by the commission, to **correct** the conditions resulting from the act,
16 practice or transaction including, **without limitation**, a requirement to provide
17 restitution as prescribed the rules **of the commission**.

18 The Arizona legislature has also **authorized the Commission** to impose administrative **penalties**.
19 See A.R.S. §44-2036. As a result, the **Commission** does not have any jurisdiction to **adjudicate the**
20 *individual and private rights* of the **Petitioners** in the instant regulatory action.

21 In support of their Application, **the Petitioners** argue that if the Division's **allegations are**
22 proven, the "Intervenors could lose their **entire** financial commitments as well as their **right to**
23 mineral aggregate purchased pursuant to **their contracts**." See Application at p.3, lines 2-4. **The**
24 **Petitioners**, who are not parties to the **regulatory** action, offer no further explanation as to **how an**
25 administrative decision rendered by the **Commission** could affect any of their claims (e.g., **private**
26 actions for violations of the **Securities Act**, **breach of contract**, declaratory relief, and **common law**
fraud) against the Respondents. In fact, a **private** right of action for violations of the **Securities Act**
may be brought against the Respondents pursuant to A.R.S. §44-2001 through A.R.S. §44-2005,
along with any common law actions, in a **civil** court of competent jurisdiction in which **all of the**
rights, duties and obligations as between **the Respondents** and the **Petitioners** may be resolved.

2. *Petitioners' personal knowledge regarding the allegations in dispute in this matter can adequately be presented by the parties in the regulatory action against Respondents.*

The role of the Petitioners, as investors, in a regulator action for violations of the Securities Act is most appropriate as witnesses. In support of the Application, the Petitioners assert that they have personal knowledge regarding certain allegations contained in the First Amended TC&D and Notice and, absent intervention, such knowledge will go ignored. See Application at p.3, lines 9-13. This assumes that neither the Division nor Respondents will call any of the Petitioners to testify at the administrative hearing. The Petitioners also state that the Division has not attempted to investigate their claims. See Application at p.3, lines 5-7. This statement is inaccurate⁴. Even if true, nothing prevents the Petitioners from forwarding information (e.g., investment documents, correspondences with the Respondents, and written statements) to the Division. The investigation by the Division is ongoing.⁵ Witness and exhibit lists have not yet been exchanged by the parties. Accordingly, the claims of Petitioners that their testimony and/or information will not be made a part of the record in this regulatory action are unfounded.

3. *A non-party is not bound by a judgment to which it is not a party.*

It is a fundamental tenet of law that a non-party is simply not bound by a judgment in an action to which it was not a party. As the Arizona Supreme Court has recognized, generally a person who is not a party to an action is not bound by the result. *Scottsdale Mem'l Health Sys., Inc. v. Clark*, 157 Ariz. 461, 466, 759 P.2d 607, 612 (1988). Whether by way of res judicata or collateral estoppel, the preclusive effect of a judgment is limited to parties and persons in privity with parties. See *Fremont Indem. Co. v. Industrial Comm'n*, 144 Ariz. 339, 342, 697 P.2d 1089, 1092 (1985) ("a stranger to a litigation may not be bound by a determination made therein for purposes of subsequent litigation"). Thus, a decision by the Commission rendered at the completion of its regulatory action will only resolve the issues in dispute as between the Commission and the

⁴ Attempts by the Division to procure information and documents from the Petitioners have been largely ignored or contested.

⁵ Cooperation by investors is an integral and necessary part of any investigation conducted by the Division pursuant to A.R.S. §44-1822. However, it would be inappropriate to allow such interested individuals to govern the manner in which such investigation is conducted.

1 Respondents. *See supra* at p. 3, lines 17-26.

2 **4. *The Petitioners cite to case law which does not support their Application.***

3 The Petitioners cite to three civil **cases** as support for their Application in the regulatory
4 action against Respondents. Each of the **three** cases are procedurally and substantively **distinct**
5 from the case before the Commission. **None** of the three **cases** supports Petitioners' request to
6 intervene.

7 In *Mountain States Tel. v. Corp. Comm'n*, 160 Ariz. 350, 773 P.2d 445 (1989), **petitioners**
8 were "ScoopLine" providers, providers of **information services** carried over Mountain Bell's
9 telephone lines. After numerous customer **complaints** regarding ScoopLine providers, the
10 Commission ordered Mountain Bell to **implement** universal blocking of all ScoopLines.
11 Petitioners requested permission to **intervene** in a special action before the Arizona Supreme Court
12 brought by Mountain Bell to challenge **the Commission's order**.

13 The *Mountain States* court **granted** **petitioners'** request under rule 2, Rules of Procedure for
14 Special Actions, which rule authorizes **intervention** under the provisions of rule 24 of the **Rules of**
15 Civil Procedure. Even if rule 24 was **applicable** to an administrative regulatory action **before the**
16 Commission, the petitioners in this case **do not** meet the *Mountain States* substantive standard. The
17 petitioners operated services that were **regulated** by the Commission's order. The Commission's
18 order affected the conduct of petitioners' **businesses** and the ability of petitioners to **communicate**
19 with potential customers. Thus, the Arizona Supreme Court granted intervention because **the**
20 Commission's order could impair the **petitioners'** fundamental federal and Arizona constitutional
21 rights.

22 The substantive reasoning of *Mountain States* does not support the Petitioners' **Application**.
23 The ScoopLine providers were directly **and substantially** affected by the Commission's **order that**
24 Mountain Bell implement universal **blocking** of all ScoopLines. The Commission's **decision in**
25 this case will not impair a fundamental **constitution** right or affect the conduct of any of the
26 businesses of Petitioners. The only **interest** **Petitioners have** that connect them to Respondents in

1 any way is their financial investment in ATI. A Commission decision that Respondents have
2 violated Arizona law will not directly and substantially affect Petitioners. The Petitioners' rights
3 with respect to their financial interests are not subject to adjudication by the Commission and an
4 order of the Commission does not preclude petitioners from protecting their financial interests in an
5 Arizona court of law.

6 In *Saunders v. Superior Court In and For County of Maricopa*, 109 Ariz. 424, 510 P.2d 740
7 (1973), petitioners sought to intervene in a lawsuit filed by the City of Nogales and two of its
8 taxpayers. Plaintiffs sought to have the act creating the Public Safety Personnel Retirement System
9 declared unconstitutional. Petitioners were employees of members of the Public Safety Personnel
10 Retirement System and beneficiaries of the retirement system. Under the standards of rule 24 of
11 the civil rules of procedure, the *Saunders* court reversed the trial court because if the Public Safety
12 Personnel Retirement System was declared unconstitutional in the proceeding, the principles of
13 stare decisis would effectively dispose of petitioners' interests without any opportunity for them to
14 be heard.⁶ Unlike the case in *Saunders*, the Commission's decision in this case will not preclude
15 Petitioners, through the principles of stare decisis or any other principles, from pursuing their
16 financial interests in the appropriate forum.

17 In *Hill v. Alpha Seed & Lumber Co.*, 38 Ariz. 70, 297 P. 868 (1931), the court reversed the
18 denial of an application for intervention from G.A. Hill. The lawsuit was brought by a company
19 seeking payment from a surety company and the bond the surety held for building material the
20 company provided to Mr. Hill. Mr. Hill was the principal under the construction contract and the
21 bond securing performance. The court noted that "the interest which entitles a person to intervene
22 in a suit between other parties must be in the matter in litigation and of such direct and immediate
23 character that the intervener will either gain or lose by the direct legal operation and effect of the
24 judgment." The court stated that "if the party seeking to intervene shows by his pleadings that he
25 is primarily or ultimately the person liable for any judgment between the other litigants, he should

26 ⁶ Rule 24 has since been amended to include the exception for intervention if "the applicant's interest is adequately represented by existing parties."

1 be allowed to intervene.” The court went on to note that Mr. Hill not only had a absolute **right to**
2 intervene, but that it was the duty of the court *sua sponte* to order him made an additional **party**.

3 Obviously, Petitioners have no **statutory** right to intervene. Additionally, **Petitioners are not**
4 directly and substantially affected as was **Mr. Hill** in *Alpha Seed & Lumber Co*. **Petitioners will**
5 not be liable for any order against **respondents** for violating Arizona law. While **Petitioners’ may**
6 argue that **Respondents’** liability under a **Commission decision** may make recouping **Petitioners’**
7 investments more difficult for **Petitioners**, **under** any standard or rule a race for the money **is not**
8 sufficient to support intervention. See *Miller v. City of Phoenix*, 51 Ariz. 254, 75 P.2d 1033 (Ct.
9 App. 1938) (right of action for damages **not affected** by a judgment in suit between plaintiff and
10 defendant). A Commission order to **cease and desist** violating the law does not preclude **operation**
11 of a legitimate business in compliance **with the** law. If **Respondents** fail to do so, the **Securities Act**
12 expressly preserves to investors, such as **Petitioners**, the opportunity to pursue their **rights and**
13 interests in a private action. See Title 44, **Chapter 12**, Article 14.

14 **B. Disclosure of information contained in the Division’s investigative files to Petitioners is**
15 **contrary to the mandates of A.R.S. 644-2042.**

16 Petitioners imply some **impropriety on** the part of the Division because it because **staff has**
17 not disclosed confidential information **regarding** its investigation to Petitioners. However, **such**
18 non-disclosure by the Division of **confidential** information is mandated by statute.

19 A.R.S. § 44-1822 authorizes the **Commission** or its **designated** agents to make **such**
20 investigations – public or private - as the **Commission** deems necessary to determine **whether any**
21 person has violated the Arizona **Securities Act**. Information and records obtained during **the course**
22 of a Commission investigation are subject to A.R.S. § 44-2042. Under A.R.S. § 44-2042
23 (“confidentiality statute”), information **and documents** obtained by the Commission during **its**
24 investigations are confidential, unless **made a** matter of public record. The confidentiality **statute**
25 prohibits the Commission’s officers, **employees**, and agents from making such information **or**
26 documents available to anyone other than **members** or agents of the Commission, the attorney

1 general, or law enforcement officials, absent disclosure authorization from the Commission or the
 2 Securities Division Director as not contrary to the public interest. Furthermore, disclosure during
 3 an investigation is contrary to the public interest and courts have frequently held that due process
 4 does not require such disclosure. *See e.g. Willner v. Committee on Character and Fitness*, 83 S.
 5 Ct. 1175 (1963) (procedural due process requires confrontation and cross-examination);
 6 *Electromec Design & Dev. Co. v. NLRB*, 409 F.2d 631 (9th Cir. 1969) (denial of prehearing
 7 depositions is not a denial of due process because the respondent has opportunity to cross examine
 8 the witnesses at a full hearing.); *Pet v. Dept. of Health Serv.*, 207 Conn. 346, 542 A.2d 672 (1988)
 9 quoting *Federal Trade Comm'n v. Anderson*, 631 F.2d 741, 748 (D.C. Cir. 1979) (Constitution
 10 does not require that a respondent be aware of all evidence, information, and leads; respondent has
 11 right to due notice of the hearing, the right to produce relevant evidence, the right to cross-examine
 12 witnesses produced by his adversary, and the right to be fairly apprised of the facts upon which the
 13 agency will act).

14 C. **The Administrative Law Judge has the authority to allow a consumer to be heard at a**
 15 **designated time without intervention.**

16 The Rules of Practice and Procedure permit a consumer to be heard at a designated time
 17 during an administrative proceeding without first becoming a party through intervention. A.A.C.
 18 R14-3-105(C) provides, in relevant part, as follows:

19 C. Other appearances. Notwithstanding the provisions of subsections R14-
 20 3-305(A) and R14-3-105(B), any consumer or prospective consumer may appear at
 21 any proceeding and make a statement on his own behalf, at a time designated by the
 22 Commission or presiding officer. A person so appearing shall not be deemed a
 23 party to the proceedings.


22 D. **Petitioner's basis for an expedited ruling on their Application is misplaced.**

23 In their Motion, Petitioner's seek an expedited ruling on their Application so that they can
 24 participate in ongoing discovery.⁷ *See Motion* p.2, lines 2-6. While the Division's investigation

25 ⁷ The state of Arizona has enacted both statutes and agency rules to address the issue of discovery in the context of
 26 administrative proceedings. Both the Arizona Revised Statutes and the Arizona Rules of Practice and Procedure before the
 Corporation Commission contain explicit provisions addressing discovery procedures in contested administrative
 adjudications. *See* A.R.S. §41-1062 and A.A.C. R-14-3-101 *et seq.*

1 pursuant to A.R.S. §44-1822⁸ is ongoing, no discovery has been ordered by the Administrative
2 Law Judge as part of these administrative proceedings. Accordingly, there is no need for an
3 expedited ruling on Petitioners' Application.

4 RESPECTFULLY SUBMITTED this 24th day of August, 2007.

5
6 
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11 **ORIGINAL AND THIRTEEN (13) COPIES**
12 of the foregoing filed this 24th day of
13 August, 2007 with:

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Phoenix, Arizona 85007

16 Copy of the foregoing hand-delivered this 24th day
17 of August, 2007 to:

18 Mr. Marc Stern
19 Administrative Law Judge
20 Arizona Corporation Commission
Hearing Division
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⁸ As part of the investigation, the Division may conduct examinations under oath pursuant to A.R.S. §44-1823.

1 Copy of the foregoing electronically mailed and mailed this 27th day
2 of August, 2007 to:

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